August 28, 1929.

Mr. E. M. Whitworth,
Vehicle Superintendent,
Motor Vehicle Division,
Arizona Highway Department,
Highway Building,
Phoenix, Arizona.

Dear Mr. Whitworth:

Referring to the Johnson matter at Nogales, Arizona, I have this report and the following conclusions to make:

As you know I reviewed with Mr. Thurman, County Attorney, at considerable length the facts in this case and the law pertaining thereto. Our conclusion is that the felony action under Paragraph 108 of the old Penal Code may not be successfully maintained. The procedure must be under Section 1692 Revised Statutes, 1928, (Motor Vehicle Code), as follows:

> "Any person who shall * * * use a false or fictitious name or address in any application for the registration of any vehicle or for any renewal or duplicate thereof, or knowingly make a false statement or knowingly conceal a material fact or otherwise commit a fraud in any such application * **"

A violation of the provisions of the code cited is a misdemeanor.

The facts of false statement and concealment of material fact are simply that, with Johnson's knowledge and under his direction and at his instigation, the motor number of the car in question was filed off and a new unauthorized number imprinted; the application for registration carried the illegally substituted number. We believe without question Johnson was a party under our statute to the commission of this misdemeanor, towit: the misrepresentation as to the lawful motor number and the concealment of the alteration.

It was proposed to proceed under Paragraph 108, P.C. 1913, being Section 4543 Revised Statutes, 1928, as follows:

> "Every person who knowingly procures or offers any false or forged instrument to be filed, registered or recorded in any public office within this state which instrument, if genuine, might be filed, registered or recorded under any law of this state or of the United States, is guilty of a felony."

There is no doubt in our mind that an application for the registration of a motor vehicle required to be filed in a public office, to-wit: that of the Vehicle Division, is an instrument within the meaning of this statute, and that a person filing

such an instrument containing a false statement of a fact material thereto is guilty of felony. This is supported by the conclusion of our State Supreme Court in Lewis vs. State, 256 Pac. 1048-1050:

> "The very fact that the state has specified an instrument may or shall be filed, registered, or recorded is evidence that in its public policy it deems it important enough for the general good of its citizens that a place and a manner be provided where the existence of the instrument may be established, and we think that section 108, supra, was passed for the express purpose of preventing the filing or recording of any false instrument no matter what its nature, if that instrument was of a character which the state considered important enough to make the instrument a public record."

It is apparent however, that our legislature has singled out in the Motor Vehicle Code the act of making a false statement or the concealment of a material fact in an application for the registration of a motor vehicle and thereby created an exception upon the general statute covering the filing of false instruments, and in so doing has reduced the penalty from a felony to a misdemeanor in the case of false representations in the application for motor vehicle registration.

The rule upon this is clear. In 36 Cyc. at page 1096,

> "On the other hand it is a well settled rule that where a statute prohibits a particular act and imposes a penalty for doing it and a subsequent statute imposes a different penalty for the same offense, the latter statute operates by way of substitution and not cumulatively and repeals the former, and this whether the penalty is increased or diminished; the intention to inflict two punishments for the same offense not being imputable to the legislature."

This rule received consideration in the late case of Espalin vs. State (Texas), 237 SW 274-275;

> "When the legislature selects certain acts, though theretofore or otherwise made penal under an existing statute, and by specific designation makes such acts punishable by a different penalty from that theretofore applicable, and essentially changes the ingredients of the new offense, such specified acts are removed from the list or classification of crimes to which they formerly belonged and must thereafter be in that class in which they are placed by such new act. This is illustrated by the well-known rules applicable to laws

making theft of certain designated property punishable by different penalties from that applicable to theft in general, such as theft of hogs, cattle, horses, etc. It would clearly no longer be proper to prosecute or to punish one charged with violating such law under the general theft statute."

The converse of the rule, proving the rule, is found in State vs. Graves (N.M.), 157 Pac. 160-161;

"The appellant was sentenced to a term in the penitentiary of not less than 2½ years, and not more then 5 years, and fined $500. He contends that the sentence was in excess of that authorized by law, and his contention is based upon the theory that Section 79 of the Compiled Laws of 1897 (Section 1613, Code 1915), which prescribes the penalty for larceny of certain animals, has been impliedly repealed by section 17, c. 36, Laws of 1907 (section 1529, Code 1915)

Section 79, Supra, provides, in effect, that any person who shall steal, embezzle, or knowingly drive, etc., any neat cattle, horse, mule sheep, goat, ass, or swine of another shall be deemed guilty of a felony, and shall be punished by imprisonment for not less than one year nor more than 5 years, and by a fine of not less than $500 nor more than $5,000, at the discretion of the court.

Section 17, c. 36, Laws of 1907, provides:

"'Any person convicted of the crime of larceny or of the crime of embezzlement or of the crime of feloniously receiving stolen goods or property, shall be punished by imprisonment in the penitentiary for any period not less than one year nor more than ten years if the value of the property stolen, embezzled or feloniously received shall exceed twenty dollars; and by imprisonment in in the county jail for a period not more than three months, or by fine not exceeding one hundred dollars, or both such fine and imprisonment in the discretion of the court if the value of the property shall be twenty dollars or less.'"

In the case of Wilburn v. Territory, 10 N.M. 402, 62 Pac. 968, the question now urged was presented to the court, and it was held that the law of 1884 was not impliedly repealed by the law of 1891, one being an act in special form, enacted for the particular protection of live stock, while the other was a general act defining the punishment of larceny, graded according to the value of the property stolen. That case is decisive of this question and settles it adversely to the contention of appellant."

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In the case of Wilburn v. Territory (N.M.) 62 Pac. 968-971, referred to in the last quoted, the Supreme Court of New Mexico states:

> "Having already given its attention to the particular subject, and provided for it, the legislature is reasonably presumed not to intend to alter that special provision by a subsequent general enactment unless that intention is manifested in explicit language, or there be something which shows that the intention of the legislature had been turned to the special act, and that the general one was intended to embrace the special cases within the previous one, or something in the nature of the general one making it unlikely that an exception was intended as regards the special act. The general statute is read as silently excluding from its operation the cases which have been provided for by the special one."

It is clear that the special statute, the Highway Code, with which we are concerned here, above quoted, is read as excluding from the operation of the general felony statute above quoted, the cases which have been provided for by the special statute.

Mr. Thurman and I prepared forms of complaint based upon the facts under consideration charging a misdemeanor under the Highway Code. Mr. Thurman asked that I write up our conclusions giving a copy to you and a copy to the Attorney General, which I am now doing. I am convinced that the Attorney General will agree with the conclusions herein reached, in which event it will be in order to notify Mr. Thurman that we are all agreed, whereupon he will proceed with the prosecution.

Yours very truly,

H. A. ELLIOTT.

HAE/C